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IN THE
Supreme Court of the United States

F. HOFFMAN-LAROCHE LTD., *et al.*,
Petitioners,

v.

EMPAGRAN, S.C., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit advocacy group with more than 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a range of consumer issues. Public Citizen has a longstanding interest in protecting American consumers from the detrimental effects of anti-competitive conduct, whether that conduct occurs domestically or abroad. For that reason, Public Citizen has testified before Congress regarding the Foreign Trade Antitrust Improvements Act and other antitrust legislation.

STATEMENT OF THE CASE

Respondents represent a class of foreign purchasers of vitamins that alleges that petitioners conspired to fix prices and allocate markets for vitamins on a global basis in violation of U.S. antitrust laws. Petitioners are foreign and domestic corporations that distribute and sell these products around the world. In July 2000, respondents filed this action under section 1 of the Sherman Act, 15 U.S.C. § 1, sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 25, as well as the antitrust laws of other nations and

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[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

international law. Specifically, respondents allege that petitioners formed a cartel to engage in a worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins in almost every market, and that this conduct had an adverse effect in the United States and other nations that injured respondents by raising the prices for these vitamins.

In the district court, petitioners moved to dismiss, arguing that the court lacked subject matter jurisdiction under U.S. antitrust laws because respondents' claims arose from transactions and conduct that took place outside the United States. Respondents argued that under the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, the courts have subject matter jurisdiction over claims based on "conduct" that has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and "gives rise to a claim" under the Sherman Act. The district court dismissed the case for lack of jurisdiction, but the United States Court of Appeals for the D.C. Circuit reversed. This Court then granted the Petition for Writ of Certiorari to resolve a split in the circuits over the scope of subject matter jurisdiction over claims based on foreign conduct that also has an anti-competitive effect on the U.S. market.

SUMMARY OF ARGUMENT

This amicus brief focuses on the legislative history of the FTAIA, explaining how the testimony at hearings, the statements in committee reports, and various amendments to the bill's language all confirm that the statute's text means just what it says: Antitrust violators can be held liable for the full extent of the harm caused by anti-competitive conduct affecting U.S. markets. The legislative history reveals that Congress was focused on holding antitrust violators responsible for all of the injuries caused by their anti-competitive conduct, and not just the domestic effects of that conduct, to fully deter antitrust violators. Significantly, specific changes made to the bill's jurisdictional language demonstrate that Congress carefully considered and expressly chose to grant jurisdiction over claims, like respondents', that arise from the foreign, rather than domestic, effects of anti-competitive conduct. In sum, this Court should affirm the Court of Appeals' ruling because the FTAIA's text, purpose, and legislative history support the conclusion that the FTAIA provides subject matter jurisdiction over *all* claims arising from conduct having a negative effect on the domestic marketplace.

The Court of Appeals correctly held that the anti-competitive conduct alleged in this case is covered by the FTAIA because that conduct has "direct, substantial, and reasonably foreseeable effects" on U.S. commerce that "gives rise to a claim," which is all that the FTAIA requires. In other words, because the domestic effects of

petitioners' anti-competitive conduct violates U.S. antitrust laws, respondents can bring a claim against petitioners arising from the foreign effects of such conduct. Indeed, if antitrust jurisdiction did not extend to such claims, then firms engaged in conduct having negative effects on both foreign and domestic commerce would have little incentive to cease their anti-competitive behavior, secure in the knowledge that they could not be held liable for the full extent of their wrongdoing. This result cannot be squared with the language, structure, or legislative history of the FTAIA, which was intended to protect the domestic market against anti-competitive behavior and "'not to limit the liability of participants in transnational conspiracies that affect United States commerce.'" *Empagran v. F. Hoffman-LaRoche, Ltd*, 315 F.3d 338, 347 (D.C. Cir. 2003) (quoting *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 433 (5th Cir. 2001) (Higginbotham, J., dissenting)).

ANTITRUST VIOLATORS WHOSE ANTI-COMPETITIVE CONDUCT NEGATIVELY AFFECTS THE U.S. MARKET ARE LIABLE FOR ALL CLAIMS ARISING FROM THAT CONDUCT.

A. Congress's Purpose in Enacting the FTAIA is Consistent With an Intent to Provide Jurisdiction Over All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market.

Congress intended the FTAIA to accomplish two goals. First, Congress sought to clarify the type of effects on U.S. commerce that would be necessary before an antitrust violator could be held liable in U.S. courts in cases involving U.S. exports. Second, Congress sought specifically to protect American exporters from antitrust suits. Both purposes are fully consistent with provisions of the FTAIA that give U.S. courts jurisdiction over all claims arising from anti-competitive conduct that affects U.S. commerce.

1. In enacting the FTAIA, Congress "clarif[ied]" the scope of "United States antitrust jurisdiction over international transactions" by stating that jurisdiction extends to "conduct having a 'direct, substantial and reasonably foreseeable effect' on domestic commerce or domestic exports." H.R. Rep. No. 97-686, at 2 (1982). Although petitioners and their amici assert that Congress's stated goal of clarifying jurisdiction is equivalent to narrowing that jurisdiction, *see, e.g.*, Pet. Br. 3; Amicus Business Roundtable Br. 6-7, 11, Congress said no such

thing. To the contrary, Congress sought to fully protect the domestic market against the detrimental effects of anti-competitive behavior — a result that could only be attained by providing jurisdiction over all claims arising from conduct that has a negative effect on U.S. commerce.

Petitioners and their amici concede that Congress sought to protect the U.S. market from anti-competitive behavior, *see* Pet. Br. 35, Amicus Business Roundtable Br. 16, Amicus Int'l Chamber of Commerce Br. 16, but fail to acknowledge that this objective cuts against petitioners' narrow reading of the FTAIA and in favor of respondents' more expansive view. To fully protect the domestic market, Congress had to establish subject matter jurisdiction over *all* claims arising from conduct negatively affecting domestic commerce. Were the FTAIA's jurisdiction limited as petitioners and their amici suggest, antitrust violators could continue to engage in anti-competitive conduct affecting U.S. and foreign markets, confident they would profit because their liability would be limited only to claims arising directly from harm to the U.S. markets. As stated in the House Report, "to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." H.R. Rep. No. 97-686, at 10.

The House Report gave examples of the type of anti-competitive conduct that would harm both domestic

and foreign markets, and thus that would be deterred only by providing for jurisdiction over *all* claims arising from the effects of that conduct — whether those effects are felt abroad or at home. As the Report explained:

> Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country — by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices — the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

H.R. Rep. 97-686, at 13. In short, Congress could only accomplish its goal of protecting the U.S. market by ensuring that antitrust violators would be held liable for *all* the harm arising from conduct having a negative effect on the U.S. market.

2. Congress's second aim in enacting the FTAIA — to limit the antitrust exposure of American exporters — by implication also supports the conclusion

that the FTAIA was intended to cover respondents' claims in this case.

In discussing the FTAIA's treatment of export-oriented activities, Congress contrasted the limited jurisdiction over export-oriented conduct with the expansive jurisdiction over all other types of anti-competitive conduct. H.R. Rep. 97-686, at 10. Accordingly, Congress explained that if export-oriented conduct injures a person "doing business in the United States," there is jurisdiction "insofar as there is injury to that person," but "a foreign firm whose non-domestic operations were injured by *the very same* export oriented conduct would have no remedy under our antitrust laws." *Id.* at 10-11 (emphasis added).

Petitioners suggest that the FTAIA's jurisdiction is *always* limited to claims based on the domestic effects of anti-competitive conduct. But Congress would not have needed to explain that jurisdiction over export-oriented conduct was limited to claims arising from domestic effects of that conduct, or to describe how that limitation was "different" from the FTAIA's grant of jurisdiction over all other types of conduct, *id.* at 10, had the two grants of jurisdiction been equivalent. *Cf. Pfizer, Inc. v. India*, 434 U.S. 308, 314 n.12 (1978) (holding that the specific prohibition against antitrust suits by foreigners injured by export-related conduct implies that jurisdiction exists when the conduct is not export-related).

B. The Legislative History Demonstrates That Congress Intended to Establish Liability for All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market.

Throughout the FTAIA's legislative history, Congress expressed its intent to hold firms liable for conduct having detrimental effects on the U.S. market. Congress's focus on anti-competitive *conduct*, as opposed to the negative domestic *effects* of that conduct, is further evidence that Congress intended to grant jurisdiction over all claims arising from such conduct.

For instance, the House Report repeatedly refers to the ability of foreign purchasers to allege a violation arising from conduct causing injury abroad as long as that conduct could also give rise to a domestic claim. In a section of the Committee Report entitled "Conduct Having a Foreign Impact," the Committee explained:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States — e.g., price fixing not limited to the export market — would affect all purchasers of the target products or services, whether the purchaser

> is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer, Inc., et al. v. Government of India, et al*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protections of our antitrust laws in the domestic marketplace, just as our citizens do.

H.R. Rep. No. 97-686, at 10 (emphasis in original). The Committee Report went on to explain that the reason for casting a wide jurisdictional net was to ensure that anti-competitive conduct causing harm to domestic markets was fully deterred:

> There are other reasons for preserving the rights of foreign persons to sue under our laws when the *conduct* in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer*, *supra*, 434 U.S. at 314-15, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amounts of damages payable only to injured domestic persons.

Id. (emphasis added). Again, Congress is expressing its intent to provide jurisdiction over all claims arising from conduct affecting the domestic market.

The House Report's citations to the *Pfizer* decision are further evidence that the Committee intended to grant jurisdiction over claims arising from the foreign as well as domestic effects of anti-competitive conduct. In *Pfizer*, the question before this Court was whether India, Iran, and the Philippines would be permitted to sue six pharmaceutical manufacturers on the ground that the six had conspired to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of antibiotics in violation of the Sherman Act. In holding that these countries could bring suit under U.S. antitrust laws, this Court noted that jurisdiction over claims by foreigners for injuries suffered abroad serves to protect American markets:

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefitted by the maximum

> deterrent effect of treble damages upon all potential violators.

Pfizer, 434 U.S. at 315.

Petitioners dismiss the above-quoted sections of the House Report and this Court's opinion in *Pfizer*, claiming that they refer only to suits by non-Americans who purchase goods in the U.S. market. Pet. Br. 37. The discussion in the House Report was not so limited. In any case, *Pfizer*'s rationale, which the Committee cited and discussed favorably, supports granting jurisdiction over *any* claim arising from conduct that negatively affects the domestic market. As *Pfizer* teaches, an antitrust violator will be deterred from engaging in anti-competitive conduct affecting the U.S. market only if all claims arising from such conduct are remediable. That logic dictates providing for jurisdiction over all claims arising from conduct having an effect on the U.S. market, because a "worldwide price-fixing scheme could sustain monopoly prices in the Unitd States even in the face of such liability [based on U.S. sales] if it could cross-subsidize its American operations with profits from abroad." *Den Norske*, 241 F.3d at 435 (Higginbotham, J., dissenting).

Significantly, much of the legislative history cited by petitioners and their amici is completely in accord with the conclusion that jurisdiction is based on conduct, not on domestic effects alone. For example, amicus International Chamber of Commerce quotes former Federal Trade Commissioner Robert Pitofsky's statement that

"transactions which exhaust their competitive consequences in foreign markets should be treated differently than those that have an internal domestic effect." Amicus Int'l Chamber of Commerce Br. 13 (quoting prepared statement of Robert Pitofsky, Esq. at Hearing on S. 795 before the Senate Comm. on the Judiciary, 97th Cong. (1981), at 45). All parties agree with Commissioner Pitofsky's view. The question here is whether a claim can be brought based on the foreign effects of transactions that do *not* exhaust their competitive consequences in foreign markets, but in fact have a negative effect on U.S. commerce. Respondents' view that the FTAIA provides for jurisdiction over such claims is perfectly consistent with Commissioner Pitofsky's statement. Indeed, Commissioner Pitofsky clearly stated that he thinks the bill should cover the conduct at issue in this case:

> I assume there is no debate that the antitrust laws *should* cover international cartel activity that affects U.S. markets — for example, a world-wide division of markets between U.S. and foreign companies that operates to exclude foreign companies from the U.S. markets — and to be absolutely certain on this point, the legislative history should probably say so.

Id. at 47 (emphasis in original).

C. Congress Amended the Bill to Clarify That Courts Have Jurisdiction Over All Claims Arising From Anti-Competitive Conduct Affecting the U.S. Market.

The text of the jurisdictional provision in the FTAIA was altered before it took its final form, and those alterations confirm that Congress intended to establish subject matter jurisdiction over all claims arising from anti-competitive conduct affecting the U.S. market.

1. The original version of the House bill, H.R. 5235, provided that U.S. courts had subject matter jurisdiction over "unfair methods of competition" having a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce when "such effect is the basis of the violation alleged under this subsection." H.R. Rep. No. 97-686, at 2. Had that last clause remained in the final version of the statute, then U.S. courts would arguably not have jurisdiction over respondents' claims. However, that clause was changed to make clear that a lawsuit may be brought even when the effect on domestic commerce is *not* "the basis of the violation alleged." Thus, the final version of the FTAIA states that U.S. courts have jurisdiction over "conduct involving trade or commerce" with "foreign nations" if the "conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce "and such effect gives rise to a claim under the provisions of this Act." The change eliminates the required direct connection between the domestic effect of the conduct and the alleged violation; the domestic effect no longer needs

to be "the basis" for the claim. As long as the domestic effect of the conduct gives rise to "*a* claim," then *any* injury arising from the conduct is actionable.

Standing alone, the change in the legislative language speaks for itself: The domestic effect of the conduct need not be "the basis" for the litigation. But any doubt about the purpose of the change is dispelled by House Committee Chairman Rodino, one of the sponsors of the legislation, who explained that the alteration to the text was necessary because the original language might erroneously "suggest that a[] [domestic] effect, rather than conduct, is the basis for a violation." H.R. Rep. No. 97-686, at 18.

Petitioners and their amici mostly ignore the explicit alteration to the bill's language. They quote statements in the legislative history describing the narrow scope of the FTAIA's subject matter jurisdiction, but fail to acknowledge that these statements were made about earlier versions of the bill in which the jurisdictional language was indeed narrower.

For example, The Business Roundtable quotes Professor James Rahl's lament that the bill "'really repeals the whole "foreign commerce" clause of the Sherman Act,'" which the Rountable points to as evidence that Rahl was "aware that the FTAIA *restricted* U.S. antitrust jurisdiction." Amicus Business Roundtable Br. 13 (emphasis in original) (quoting Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. On the Judiciary, 97th Cong. (1981), at 46).

("House Hearings"). However, Rahl's criticism came *before* the bill's jurisdictional language was altered to address the very concern that he raised. H.R. Rep. 97-686, at 13. Thus, Rahl's testimony demonstrates that, prior to the change in the language, the legislation was unclear as to whether jurisdiction was limited to claims arising directly from domestic effects of anti-competitive conduct. The ambiguous language, which was criticized as potentially preventing U.S. courts from having subject matter jurisdiction over conduct adversely affecting the U.S. market, led to the change in language that was ultimately enacted into law.

Indeed, at the time of the 1981 Congressional hearings, The Business Roundtable was well aware that the jurisdictional language in the original version of H.R. 2326 was ambiguous. In its hearing testimony, The Business Roundtable expressed concern that the jurisdictional language was unclear and suggested that it be clarified to establish that there was *no* jurisdiction over claims that did not arise from domestic effects of anti-competitive conduct. In his testimony on behalf of The Business Roundtable, Martin Connor stated:

> [W]e urge the committee to clarify the intent of the legislation with respect to antitrust damage actions. As drafted, the bill probably precludes damages suits based on foreign effects of alleged antitrust violations. There is, however, some ambiguity on this score.

> For example, a foreign purchaser of U.S. exports could argue that the defendant's conduct had domestic as well as foreign effects and that the existence of some domestic effects creates a basis for a damage action based on the foreign effects as well.

House Hearings at 106. To clarify the bill's scope, Connor proposed the following amendment to the jurisdictional provisions:

> If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable only for any injury so occurring within the United States by reason of such restraints.

Id. at 111. The Business Roundtable's suggestion was not adopted by Congress.

Taking the opposite position from The Business Roundtable were experts who testified that the law should be amended to ensure that cartels could be held liable for all anti-competitive conduct that has a negative effect on U.S. commerce. For example, Professor Rahl testified that the language of the bill had "serious ambiguities." *Id.* at 46. In particular, he was concerned that it appeared to apply only to claims arising from "foreign trade causing an effect on interstate commerce." *Id.* In testimony quoted

in the House Report, H.R. Rep. 97-686, at 13, Rahl explained that the unclear jurisdictional language creates "the risk that this provision would encourage American firms not only to form cartels among themselves, but to participate in foreign and international cartels" causing "increased cartel activity and long-run damage to trade." *Id.* at 46. The House Report described Rahl's testimony as the "most important criticism" of the bill. H.R. Rep. 97-686, at 13.

It was in the context of this dispute over the ambiguous jurisdictional language that Chairman Rodino proposed changing the language to clarify that, if anti-competitive conduct has an effect on domestic commerce, a claim could be brought based on *any* injury arising from the anti-competitive conduct, whether arising in a domestic or foreign market.

2. Another change to the jurisdictional language further underscores Congress's intent to provide for jurisdiction over claims such as respondents'. During the legislative process, the bill that became the FTAIA was amended to make clear that the domestic "effect" that is the prerequisite for subject matter jurisdiction must itself be an antitrust violation. In fact, the purpose of the "gives rise to a claim" language is to ensure that courts would only have jurisdiction over conduct having *negative* effects on U.S. commerce. That clarification would have been wholly unnecessary if, as petitioners' contend, jurisdiction were limited to claims arising from the domestic effects of the conduct. Obviously, if plaintiffs could only bring

claims arising from domestic effects, then there was be no need to clarify that those "effects" must themselves be antitrust violations. Yet the House Committee Report devoted significant space to the discussion of this clarification:

> [T]he domestic 'effect' that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. *See, e.g., National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981). For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.
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> * * *
>
> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace.

H.R. Rep. No. 97-686, at 11 (emphasis in original).

Put simply, the Committee could not have intended to limit jurisdiction to claims arising from domestic effects if it felt the need to clarify that the effect that is the "predicate" for jurisdiction must itself be "be of the type that the antitrust laws prohibit." *Id.* Indeed, this discussion would be nonsensical unless the FTAIA is read to provide for jurisdiction over all claims arising from conduct having domestic effects.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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